UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| MICHELE D. LYDE,<br><br>Plaintiff,<br><br>v.<br><br>MICHAEL J. ASTRUE, Commissioner of Social Security,<br><br>Defendant. | CASE NO. C11-1526-JLR-MAT<br><br><br><br>REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL |

Plaintiff Michele D. Lyde proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). The Court finds this case appropriate for decision without oral argument. Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

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## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1961.[1] She has a GED and previously worked as a fish packer. (AR 32, 36.)

Plaintiff filed an application for DIB and protectively for SSI benefits on May 17, 2007, alleging disability beginning January 31, 2006. She is insured for DIB through June 30, 2011. (AR 13.) Plaintiff's applications were denied at the initial level and on reconsideration. Plaintiff timely requested a hearing.

On April 7, 2010, ALJ John Bauer held a hearing, taking testimony from plaintiff and a vocational expert. (AR 29-44.) At hearing, plaintiff amended her alleged onset date to April 1, 2006. (AR 13, 37.) On April 29, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR 13-24.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on July 7, 2011 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

## JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

not engaged in substantial gainful activity since the amended alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's depression, not otherwise specified, anxiety, not otherwise specified, and substance abuse severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform a full range of work at all exertional levels but with the following nonexertional limitations: plaintiff can perform simple, routine tasks that require no more than occasional contact with the general public. With that assessment, the ALJ found plaintiff able to perform her past relevant work as a fish packer, as actually and generally performed.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881

F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erroneously evaluated the medical opinion testimony, erred in the consideration of post-traumatic stress disorder (PTSD) and substance abuse, and erred in finding her capable of performing her past relevant work. She requests remand for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

Step Two

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996 (quoting Social Security Ruling 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. at 1290 (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

A diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show that his medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c),

416.920(c).

A. PTSD

Plaintiff argues the ALJ erred in failing to find PTSD a severe impairment at step two, asserting the ALJ failed to consider "substantial and undisputed evidence" which supported this finding. (Dkt. 20 at 17.) The Commissioner argues the ALJ appropriately found the record lacked sufficient objective evidence to support a clear diagnosis of PTSD. At the most, the Commissioner argues, plaintiff is simply asking for a more favorable reading of the evidence, an insufficient basis for overturning the rational interpretation of the ALJ. The Court agrees with the Commissioner.

At step two, the ALJ found the diagnosis of PTSD unsupported by the record. (AR 16.) The ALJ acknowledged that consultative examiner Dr. Widlan noted the diagnosis as appearing in previous records, but found plaintiff did not meet the criteria for this diagnosis. The ALJ cited Dr. Widlan's observation that the previous records provided minimal information to support the diagnosis. (AR 272.) While plaintiff's nurse practitioner at Sound Mental Health listed PTSD as a "rule out" diagnosis (AR 16, 329, 346), this provider is not an "acceptable medical source" qualified to establish a medically determinable impairment. 20 C.F.R. §§ 404.1513(a), 416.913(1), SSR 06-03p. While information from "other sources" such as a nurse practitioner may be considered (*id.*), such evidence is insufficient by itself to make this showing.

Although plaintiff posits the sufficiency of the report of state agency reviewing doctor Mary Gentile, Ph.D., as support for a PTSD diagnosis, the ALJ correctly noted the lack of collateral sources of information for a PTSD diagnosis in the various state agency evaluations.

(AR 16.) Indeed, even Dr. Gentile found the diagnosis "questionable". (AR 267.) Furthermore, plaintiff fails to meet her burden of showing the harmfulness in any error in the ALJ's omission of PTSD as a step two diagnosis, or to suggest any specific resulting limitations. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (failure to list impairment as severe at step two harmless where limitations considered at step four).

Plaintiff also argues the ALJ failed to call a testifying medical expert at hearing to assess the treatment records, but fails to make a showing of the necessity for such an expert in this case. The Court finds the ALJ's omission of PTSD as a step two severe impairment supported by substantial evidence.

B. Substance Abuse

Plaintiff takes issue with the ALJ's step two finding of a severe impairment of substance abuse, and argues her substance abuse should not have been considered in the analysis of her credibility. Plaintiff further argues the ALJ did not properly conduct the Drug Abuse and Alcoholism (DAA) analysis. However, plaintiff's argument seems to be based on a misapprehension of the DAA analysis in the context of the sequential evaluation of disability.

A claimant is not entitled to disability benefits "if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must conduct a DAA analysis and determine whether a claimant's disabling limitations remain absent the use of drugs or alcohol. 20 C.F.R. §§ 404.1535, 416.935. That is, the ALJ must first identify disability under the five-step procedure and then conduct a DAA analysis to determine whether substance abuse was material to disability. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th

Cir. 2001). "If the remaining limitations would still be disabling, then the claimant's drug addiction or alcoholism is not a contributing factor material to his disability. If the remaining limitations would not be disabling, then the claimant's substance abuse is material and benefits must be denied." *Parra v. Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007). As with each of the first four steps of the disability evaluation process, the claimant bears the burden of showing that his or her DAA is not a contributing factor material to his or her disability. *Id.*; *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).

Here, after proceeding through the sequential evaluation, the ALJ did not find plaintiff disabled. Therefore, there was no need to conduct the DAA analysis.

Furthermore, aside from the materiality of the plaintiff's drug addiction or alcoholism, a lack of truthfulness about substance use is a proper consideration in the evaluation of plaintiff's credibility. *Verduzco v. Apfel*¸188 F.3d 1087, 1090 (9th Cir. 1999). *See also Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("In reaching his findings, the law judge is entitled to draw inferences logically flowing from the evidence.") (cited sources omitted). Here, the ALJ found inconsistent plaintiff's reports to her providers regarding the nature and extent of her substance abuse:

> During the March 2006 DSHS evaluation, the claimant told Dr. Carstens that she had been in substance abuse treatment "years ago" and that she had been clean and sober for four years" [AR 209], a report that is inconsistent with subsequent records that note the claimant's long history of cocaine use [AR 237]. When the claimant was seen at Harborview's emergency room in December 2006, a toxicology screen was positive for cocaine [AR 249], and during a primary care visit in January 2007, the claimant declined to provide a urine sample [AR 226-27.] In March 2007, the claimant reported to a nurse practitioner at Pioneer Square Clinic that she had been clean and sober for one month [AR 224], and during the July 2008 consultative evaluation, the claimant told Dr. Widlan that she had been clean and sober from cocaine for one year [AR

> 269-70]; however, at the hearing, it was established that the claimant last used in August 2009. The claimant has clearly continued to use drugs, and her inconsistent reports render her allegations regarding her mental health symptoms less credible, especially in light of observations such as those made at Harborview in August 2007 that her mood symptoms were likely the result of her cocaine use [AR 237.]

(AR 21.) The Court does not find error in the ALJ's consideration of plaintiff's substance abuse in the evaluation of her credibility.

Medical Opinions

Plaintiff argues the ALJ erred in the evaluation of certain medical opinion evidence. Plaintiff contends the reasons given by the ALJ were not specific and legitimate because the ALJ relied only on those opinions that supported a denial of benefits and rejected those that supported plaintiff's claims. (Dkt. 20 at 4.) However, plaintiff misapprehends the requirements of a legally sufficient analysis of the medical evidence.

An ALJ's reliance on the portions of medical evidence that support a denial of benefits and rejection of the opinions that do not is not error, so long as the ALJ's conclusion is supported by substantial evidence and the reasons given are legally sufficient. "The ALJ is responsible for resolving conflicts in the medical record." *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003)). *Accord Thomas*, 278 F.3d at 956-57 ("When there is conflicting medical evidence, the Secretary must determine credibility and resolve the conflict.") (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.

1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

The ALJ need not discuss each piece of evidence in the record. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). Instead, the ALJ "must explain why 'significant probative evidence has been rejected.'" *Id*. (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).

A. State Agency Consultants

Plaintiff argues the ALJ failed to explain the weight accorded the Psychiatric Review Technique form completed by Dr. Gary Nelson. (AR 280-93.) However, as acknowledged by plaintiff, the ALJ discussed and adopted the Mental Residual Functional Capacity Assessment (MRFCA) form completed by Dr. Nelson. (AR 276-79.) Plaintiff does not articulate any way in which this omission was relevant to the resolution of this case, or point to any particular opinions of Dr. Nelson that should have been given weight by the ALJ. Claims that are unsupported by explanation or authority may be deemed waived. *See generally Carmickle*, 533 F.3d at 1161 n.2 (declining to address issues not argued with any specificity) (citing *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003) (the court "ordinarily will not consider matters on appeal that are not specifically and distinctly argued in an appellant's opening brief")).

Plaintiff also argues the ALJ failed to mention the assessment by Mary Gentile, Ph.D. However, as discussed above, the ALJ declined to adopt as insufficiently supported the opinion of any of the state agency evaluators on the PTSD diagnosis. (AR 16.) On its face, Dr. Gentile's report is one of the state agency evaluation reports suffering from this deficiency.

*See, e.g.*, *Magallanes*, 881 F.2d at 755 (a reviewing court may draw "specific and legitimate" inferences from the ALJ's opinion). Plaintiff does not suggest any other specific opinion of Dr. Gentile that should have been discussed.

B. David Widlan, Ph.D.

Plaintiff argues the ALJ failed to explain the weight given to Dr. Widlan's assignment of a Global Assessment of Functioning (GAF) score of 40. (AR 272.) While the ALJ did not specifically mention this score, he declined to give weight to that part of Dr. Widlan's assessed limitations based on plaintiff's subjective reports, which the ALJ found not credible. (AR 22.) An ALJ may reject a treating physician's opinion if it is based "'to a large extent'" on a claimant's self-reports that have been properly discounted as incredible. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)). While plaintiff argues the GAF score is not based on her subjective reports, Dr. Widlan's report indicates otherwise, stating it was based on a clinical interview of plaintiff, as well as emergency service notes from Harborview Medical Center. (AR 269.) Indeed, the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (DSM-IV-TR), specifically provides that the GAF assessment is made based on either the individual's symptoms or her functional impairments, whichever is lower. DSM-IV-TR at 32-33. "A GAF score is a rough estimate of an individual's psychological, social, and occupational functioning used to reflect the individual's need for treatment." *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir.1998). The Commissioner has determined the GAF scale "does not have a direct correlation to the severity requirements in [the Social Security Administration's] mental disorders listings." 65 Fed. Reg. 50,746, 50,765-766 (Aug. 21, 2000). The Court, for

all of these reasons, finds no error in relation to the GAF score from Dr. Widlan.

C. Luci Carstens, Ph.D.

Dr. Carstens evaluated plaintiff on March 1, 2006 for Washington State DSHS. (AR 209-15.) The ALJ did not find persuasive Dr. Carstens' opinion regarding moderate limitations in plaintiff's ability to learn new tasks, to exercise judgment and make decisions, and to perform routine tasks, finding such cognitive limitations unsupported by Dr. Carstens' exam findings of "some mild difficulties" with focused attention and concentration. (AR 22.) Similarly, the ALJ did not give significant weight to the social limitations assessed by Dr. Carsten consisting of moderate limitations in her ability to interact appropriately in public contacts, and marked limitations in her ability to relate appropriately to co-workers and supervisors and to respond appropriately to and tolerate the pressures and expectations of a normal work setting. The ALJ found this portion of Dr. Carstens' opinion undermined by a reliance on plaintiff's unreliable subjective reports, a finding which plaintiff does not challenge. The ALJ gave very little weight to the GAF score of 45 assessed by Dr. Carstens, finding it inconsistent with mental status exam findings and based in large part not on plaintiff's mental health condition, but on outside psychosocial stressors, such as unemployment, finances, and transitional housing.

The Court finds unavailing plaintiff's argument that the ALJ's evaluation of Dr. Carstens' opinions lacks the support of substantial evidence. Plaintiff argues the ALJ ignored the results of "soci-emotional functioning" tests, and disputes the ALJ's rejection of Dr. Carstens' assessment as based on plaintiff's subjective reports. However, the ALJ reasonably noted that Dr. Carstens used direct quotes from plaintiff in support of the assessed limitations.

(AR 22.) (*See, e.g.*, AR 211 ("Ms. Lyde stated that she tends to be 'on edge' emotionally and has a difficult time maintaining her composure when she is around people.")) As stated above, an ALJ may reject a physician's opinion based to a large extent on a claimant's self-reports properly discounted as incredible. *Morgan*, 169 F.3d at 602. Further, the ALJ did not ignore testing conducted by Dr. Carstens; he found it inconsistent with the rest of the doctor's findings. The rejection of a physician's opinion due to discrepancy or contradiction between the opinion and the physician's own notes or observations is "a permissible determination within the ALJ's province." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).[2]

D. Robert E. Parker, Ph.D.

Dr. Parker conducted an evaluation of plaintiff for DSHS on August 21, 2006. (AR 216-23.) He assessed major depression, recurrent severe without psychosis, PTSD, and history of cocaine dependence, with a number of functional limitations. (*Id.*) He felt plaintiff might need monitoring "for episodic alcohol use/abuse". (AR 218.)

Plaintiff contends the ALJ's consideration of Dr. Parker's opinions lacks the support of substantial evidence. However, the Court finds no fault with the ALJ's reasoning. The ALJ noted that Dr. Parker assessed no cognitive limitations other than moderate limitations in plaintiff's ability to perform routine tasks, and found a lack of explanation for this limitation in the doctor's report coupled with "essentially unremarkable mental status examination findings". (AR 22.) Plaintiff argues the ALJ disregarded Dr. Parker's "clinical assessment and objective findings" (Dkt. 20 at 11), but his report contains no indication of any

2 Plaintiff's final argument that the ALJ was required to provide citations to the record supporting "the remaining reasons" for rejecting Dr. Carstens' opinion is insufficiently specific to permit consideration. *Carmickle* , 533 F.3d at 1161 n.2.

abnormalities in that regard. Similarly, the ALJ declined to give probative weight to Dr. Parker's assessment of moderate limitations in plaintiff's ability to interact appropriately in public contacts, to control physical or motor movements and maintain appropriate behavior, marked limitations (AR 216 ("very significant interference with basic work-related activities")) in her ability to relate appropriately to co-workers and supervisors, and severe limitations (*id.* ("inability to perform one or more basic work-related activities")) in her ability to respond appropriately to and tolerate the pressures and expectations of a normal work setting. An ALJ may properly reject an opinion that is conclusory and inconsistent with the record. *See generally Meanel v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir. 1999); *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986).

Plaintiff also disputes the ALJ's evaluation of Dr. Parker's opinions as negatively impacted by a failure to adequately consider the effects of her substance abuse, arguing Dr. Parker found no such ongoing or chronic problem in this regard. The ALJ, however, found otherwise, noting the contradiction between plaintiff's assertion in March 2006 that she had been "clean and sober for four years" (AR 209) and medical records to the contrary (*see, e.g.*, AR 224, 230-52, 237 ("46 y.o. female with a long history of cocaine dependence going back for many years and documented in the medical records")). The Court finds legally sufficient reasons provided for the ALJ's evaluation of Dr. Parker's opinions.

E. Amelia Hodges, Lic. SW

Plaintiff assigns error to the lack of weight given by the ALJ to the MRFCA form completed by her treating mental health counselor, Amelia Hodges, Lic.SW. (AR 325.) Plaintiff argues the ALJ failed to articulate "any clear and convincing reasons" for rejecting this

opinion, as well as those of her other examining and treating providers. (Dkt. 20 at 14.)

However, the standard for evaluating the legal sufficiency of the ALJ's consideration of the contradicted opinions of a treating or examining physician is "'specific and legitimate reasons' supported by substantial evidence in the record". *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). Furthermore, in considering the opinion of a social worker such as Ms. Hodges, the ALJ may assign less weight to this non-"acceptable medical source", so long as the ALJ generally explains the weight given to the opinion and provides germane reasons for doing so. *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996). *See also Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010) (lay testimony from other sources may be expressly disregarded if the ALJ gives germane reasons for doing so).

The Court finds the ALJ provided germane reasons for the lack of weight given to Ms. Hodges' assessment. Although the ALJ noted the signature on the document was illegible, he recognized the person was a social worker.[3] The ALJ found "inherently less persuasive" the social worker's opinion that "nearly everything would increase the claimant's level of impairment", noting the check-box form was unsupported by any mental status examination findings or other records. (AR 23.) *Molina v. Astrue*, 674 F.3d 1103, 1111 (9th Cir. 2012) (ALJ may "'permissibly reject[ ] . . . check-off reports that [do] not contain any explanation of the bases of their conclusions.'") (quoting *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); also citing *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) ("[T]he regulations give

3 Plaintiff argues the ALJ violated his duty to fully and fairly develop the record by not conducting an inquiry to determine who completed the form. *Smolen*, 80 F.3d at 1288 (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). An ALJ has an obligation to recontact a treating physician when the evidence received is inadequate for a determination of disability. 20 C.F.R. §§ 404.1512(e), 416.912(e); *see also Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th Cir. 2006). The Court does not find facts or circumstances here that would give rise to such a duty.

more weight to opinions that are explained than to those that are not.")) Plaintiff, therefore, does not establish error in the ALJ's consideration of the MRFCA evaluation by Ms. Hodges.

Step Four

Plaintiff argues the ALJ erred at step four by relying on an inaccurate RFC assessment, and by failing to properly develop vocational expert testimony regarding his past relevant work.

A. RFC

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess her work-related abilities on a function-by-function basis, including a narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p.

Here the ALJ made the following assessment of plaintiff's RFC:

> After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations: The claimant can perform simple, routine tasks that require no more than occasional contact with the general public.

(AR 18.)

Although plaintiff contends the RFC was inadequate, this argument is a corollary to plaintiff's assertion that the ALJ improperly weighed the medical opinion testimony. As the Court has concluded the ALJ did not err in assessing the medical evidence, this argument fails. The ALJ is not required to include limitations for which there is no substantial evidence support. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1164-65 (9th Cir. 2001); *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (holding the ALJ need not include in the RFC assessment properly discounted opinion evidence or claimant testimony).

The RFC included all of the limitations found by the ALJ to be supported by substantial evidence.

B. Past Relevant Work

Plaintiff bears the burden at step four of demonstrating she can no longer perform her past relevant work. 20 C.F.R. §§ 404.1512(a), 404.1520(f); *Barnhart v. Thomas*, 540 U.S. 20, 25 (2003). Nevertheless, the ALJ retains a duty to make factual findings to support his conclusion, including a determination of whether a claimant can perform the actual demands and job duties of her past relevant work or the functional demands and job duties of the occupation as generally performed in the national economy. *Pinto v. Massanari*, 249 F.3d 840, 844-45 (9th Cir. 2001) (citing SSR 82-61). "This requires specific findings as to the claimant's residual functional capacity, the physical and mental demands of the past relevant work, and the relation of the residual functional capacity to the past work." *Id.* (citing SSR 82-62).

One purpose of the Dictionary of Occupational Titles (DOT) is to classify job titles by their exertional and skill requirements. *Johnson v. Shalala*, 60 F3d 1428, 1434, n.6 (9th Cir. 1995). The DOT raises a rebuttable presumption as to job classification, and is the best source for how a job is generally performed. *Id.*, at 1435-46; *Pinto*, 249 F.3d at 845-46.

Plaintiff's past relevant work was as a fish packer. (AR 23, 36-37.) The vocational expert (VE) testified this corresponds to DOT No. 920.687-086, classified as heavy, unskilled work. (AR 36-37.) The ALJ found plaintiff's residual physical and mental functional capacity consistent with the physical and mental demands of this work. (AR 23-24.)

Plaintiff first argues the ALJ erred in neglecting to ask the VE if the description of his

past relevant work was consistent with the DOT. Pursuant to SSR 00-4p, an ALJ has an affirmative responsibility to inquire as to whether a VE's testimony is consistent with the DOT and, if there is a conflict, determine whether the VE's explanation for such a conflict is reasonable. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007). As stated by the Ninth Circuit: "[A]n ALJ may rely on expert testimony which contradicts the DOT, but only insofar as the record contains persuasive evidence to support the deviation." *Johnson*, 60 F.3d at 1435-36 (VE testified specifically about the characteristics of local jobs and found their characteristics to be sedentary, despite DOT classification as light work).

Plaintiff accurately observes the ALJ's failure to affirmatively ask the VE whether his testimony was consistent with the DOT. However, in this case, the error can be deemed harmless because plaintiff does not allege any actual conflict with the DOT. *See Rushing v. Astrue*, 360 Fed. Appx. 781, 783, 2009 WL 5033730 (9th Cir. 2009) (failure to ask VE regarding consistency with the DOT harmless where plaintiff did not allege the VE's testimony was actually inconsistent with the DOT) (citing *Massachi*, 486 F.3d at 1153-54 [n. 19] ("This procedural error could have been harmless, were there no conflict, or if the vocational expert had provided sufficient support for her conclusion so as to justify any potential conflicts, as in *Johnson*. Instead, we have an apparent conflict with no basis for the vocational expert's deviation.")).

Next, plaintiff contends the ALJ failed to make inquiry or findings about the mental demands of plaintiff's past relevant work, and failed to ask the VE for an opinion regarding

plaintiff's ability to do that work.[4] While the ALJ did not make specific findings regarding plaintiff's past relevant work as actually performed, an ALJ need not render "explicit findings at step four regarding a claimant's past relevant work both as generally performed and as actually performed." *Pinto*, 249 F.3d at 844-45 (emphasis supplied). Plaintiff argues her past relevant work "as generally performed" is inconsistent with the RFC assessed by the ALJ limiting her to "simple routine" tasks and with the DOT description for the job. The Court finds this argument unavailing. "Fish Packer", DOT 920.687.086, does specify a Reasoning Level of 2, defined, *inter alia*, as requiring an ability "to carry out detailed but uninvolved written or oral instructions". DOT, App. C. However, a limitation to simple, routine tasks has been found consistent with the DOT description of a job requirement of level two reasoning. *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 984-85 (C.D. Cal. 2005). Plaintiff does not succeed in establishing error in the ALJ's step four finding.

## CONCLUSION

For the reasons set forth above, the decision of the Commissioner should be AFFIRMED.

DATED this 14th day of September, 2012.

Mary Alice Theiler
United States Magistrate Judge

4 Plaintiff also argues in her Reply Brief that the ALJ failed to reconcile the VE's testimony about the seasonal nature of her past relevant work (AR 37) and the DOT. However, arguments not raised in an appellant's opening brief are deemed waived. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (citing *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)). Further, the Commissioner correctly notes that seasonal work may qualify as past relevant work. *See, e.g., Byington v. Chater*, 76 F.3d 246 (9th Cir. 1996) (finding past relevant work as a school bus driver to be substantial gainful activity).